



NATIONAL LABOR RELATIONS BOARD

29 CFR Part 102

RIN 3142-AA12

Representation Case Procedures

AGENCY: National Labor Relations Board

ACTION: Final rule; stay of effective date.

SUMMARY: On March 10, 2023, the National Labor Relations Board (Board) stayed two provisions of its 2019 final rule (“2019 Final Rule”) amending its representation case procedures. The two provisions, which have never been in effect, were stayed until September 10, 2023 to account for new court decisions and because the Board was considering whether to revise or rescind the 2019 Final Rule, including potential revisions to the two provisions. In a rule that published in this edition of the *Federal Register*, the Board rescinds those provisions, among other changes. In light the new rule, and to ensure the two provisions do not go into effect for only a short period of time, the September 10, 2023 stay of the two provisions is extended to December 26, 2023, the date on which the rule repealing the two provisions is effective.

DATES: As of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], the amendments to 29 CFR 102.64(a) and 29 CFR 102.67(b) in the final rule that published at 84 FR 69524, on December 18, 2019, and delayed at 85 FR 17500 (March 30, 2020) and 88 FR 14913 (March 10, 2023), are stayed from September 10, 2023, until December 26, 2023.

FOR FURTHER INFORMATION CONTACT: Roxanne L. Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half St., SE, Washington, DC 20570-0001, (202) 273-2940 (this is not a toll-free number), 1-866-315-6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION

On December 18, 2019, the Board published the 2019 Final Rule amending various aspects of its representation case procedures. *Representation-Case Procedures*, 84 FR 69524 (Dec. 18, 2019). The Board published the 2019 Final Rule as “a procedural rule which is exempt from notice and public comment . . . as a rule of ‘agency organization, procedure, or practice.’” *Id.* at 69587. On March 30, 2020, the Board delayed the effective date of the 2019 Final Rule to May 31, 2020. *Representation Case Procedures*, 85 FR 17500 (Mar. 30, 2020).

On May 30, 2020, the United States District Court for the District of Columbia issued an order in *AFL-CIO v. NLRB*, Civ. No. 20-cv-0675, vacating five provisions of the 2019 Final Rule and enjoining their implementation. 466 F. Supp. 3d 68 (D.D.C. 2020). The District Court concluded that each of the five provisions was substantive, not procedural, in nature, and that the Board therefore violated the Administrative Procedure Act by failing to use notice and comment rulemaking. *Id.* at 92.

On January 17, 2023, the United States Court of Appeals for the District of Columbia Circuit issued a decision and order reversing the District Court as to two of the five provisions, agreeing with the Board that those provisions were procedural in nature and not subject to notice and comment rulemaking. *AFL-CIO v. NLRB*, 57 F. 4th 1023, 1043-1046 (D.C. Cir. 2023). The two provisions are: (1) an amendment to 29 CFR 102.64(a) allowing the parties to litigate disputes over unit scope and voter eligibility prior to the election;¹ and (2) an amendment to 29 CFR 102.67(b) instructing Regional Directors not to schedule elections before the 20th business day after the date of the direction of election.² The D.C. Circuit remanded the case to the District Court to

¹ 84 FR at 69593.

² 84 FR at 69595.

consider two counts in the complaint that challenge those two provisions and that remain viable in light of its decision.

Due to the District Court's injunction, these two provisions had never taken effect. Accordingly, before the D.C. Circuit's mandate issued on March 13, 2023 and the District Court's injunction was lifted, the Board changed the effective date of the two provisions from the original May 31, 2020 effective date to September 10, 2023, approximately six months from the D.C. Circuit's mandate. *Representation Case Procedures*, 88 FR 14913 (Mar. 10, 2023). The Board determined that a delayed effective date was necessary and appropriate, in part, because it was considering whether to revise or repeal the 2019 Final Rule, including potential revisions to the two provisions. *Id.*

In a final rule published in this issue of the *Federal Register*, the Board has decided to repeal those two provisions, as well as other provisions in the 2019 Final Rule. In light of today's rule, the Board has decided to stay the effective date of the two provisions from September 10, 2023 to December 26, 2023, the effective date of the rule repealing the two provisions. A further stay of these provisions will avoid the possible waste of administrative resources and public uncertainty if the provisions were to go into effect only for a short period of time before their repeal. Because the two provisions have never been in effect, the amendment to their effective date merely extends the status quo.

This change in effective date is published as a final rule. The Board considers this rule to be a procedural rule that is exempt from notice and public comment, pursuant to 5 U.S.C. 553(b)(A), because it concerns a rule of "agency organization, procedure, or practice."

Dissenting opinion of Member Kaplan

Today, my colleagues once again stay the implementation of the unit-scope-and-eligibility and 20-days rules, both of which were part of the 2019 Final Rule. They do so because, in a companion final rule issued today, they have decided to repeal these two provisions, along with other provisions of the 2019 Final Rule. I disagree with my colleagues' decision to rescind these two provisions and with their concomitant decision to stay implementation for the reasons stated in my dissent to their earlier stay, *Representation Case Procedures*, 88 FR 14913, 14914-14916 (March 10, 2023), and my dissent to the companion final rule issued today.

Dated: August 18, 2023

Roxanne L. Rothschild,

Executive Secretary

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